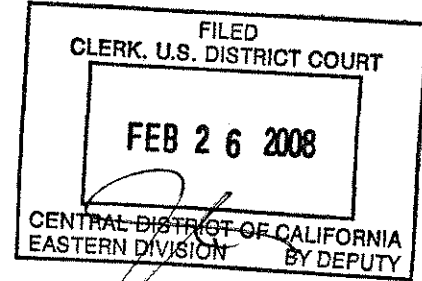


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8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 CADE NELSON RAGER, through his
12 Mother and Guardian *ad litem*, DENISE
13 RAGER, and THE EPILEPSY
14 FOUNDATION;

13 Plaintiffs,

14 v.

15 TUTOR TIME LEARNING
16 CENTERS, LLC and GFGTT
17 HOLDINGS, Inc.,

18 Defendants

Case No.: EDCV 07-00189-SGL (OPx)

**~~PROPOSED~~ THIRD AMENDED
COMPLAINT**

**DEMAND FOR JURY TRIAL
(F.R.CIV.P. RULE 38(B); L.R. 38.1)**

The Hon. Stephen G. Larson
Room: 1
Date: March 3, 2008
Time: 10:00 a.m.

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20
21 **JURISDICTION AND VENUE**

22 1. This Court has jurisdiction over Plaintiff Cade Nelson Rager's and
23 Plaintiff Epilepsy Foundation's ADA claims under 28 U.S.C. §§ 1331, 1343(a)(4).

24 2. This Court has supplemental jurisdiction over Plaintiffs' state law claims
25 under 28 U.S.C. § 1367 because they are so related to Plaintiffs' ADA claims that
26 they form part of the same case or controversy under Article III of the United States
27 Constitution.

28 3. Venue in this case is proper in this Court under 28 U.S.C. § 1391 because

1 a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred
2 within this judicial district.

3 **INTRODUCTION**

4 4. Plaintiff Cade Rager, an eight-year old boy with epilepsy, through his
5 mother and Guardian Ad Litem Denise Rager, and Plaintiff Epilepsy Foundation, a
6 non-profit organization, bring this action under Title III of the Americans with
7 Disabilities Act of 1990 (ADA), 42 U.S.C. § 12182 et seq., the Unruh Civil Rights
8 Act ("UCRA"), Cal. Civil Code § 51, and Cal. Civil Code §§ 54 and 54.1 against
9 Defendants, which are business establishments and places of public accommodation,
10 for their failure to allow Plaintiff Rager and other children who have Epilepsy and
11 are members of the Epilepsy Foundation to attend their child care center based on
12 their disability, and for refusing to reasonably modify their policies and procedures
13 to allow Plaintiff Rager and other children who have Epilepsy to attend their child
14 care centers. Specifically, Defendants have refused to modify their policy
15 prohibiting the administration of a life saving medication in order to allow the
16 Plaintiffs and other children with Epilepsy to attend and participate in its programs.

17 **PARTIES**

18 5. Plaintiff Cade Rager is an eight-year old boy, born on May 3, 1999. He
19 has been diagnosed with epilepsy, cerebral palsy, and mental retardation. Plaintiff
20 Rager resides in Corona, Riverside County, California and brings this action through
21 his mother and Guardian Ad Litem Denise Rager.

22 6. Plaintiff Rager has a disability and a medical condition as defined by
23 the ADA, UCRA, and Cal. Civil Code §§ 54, 54.1.

24 7. Plaintiff Rager has a record of a disability and medical condition as
25 defined by the ADA, UCRA, and Cal. Civil Code §54.1.

26 8. Plaintiff Rager has been prescribed the use of a medication known as
27 Diastat, a liquid form of valium that is administered during a seizure, therefore
28 preventing the threat of harm or serious bodily injury. Diastat is commonly used by

1 persons who have Epilepsy and is the preferred treatment for seizures lasting longer
2 than five minutes.

3 9. Plaintiff Epilepsy Foundation is a non-profit organization that provides
4 advocacy and support for people who have Epilepsy. The Epilepsy Foundation's
5 mission is to "ensure that people with seizures are able to participate in all life
6 experiences; and prevent, control and cure epilepsy through services, education,
7 advocacy and research. . . . [The Epilepsy Foundation also] works to improve how
8 people with epilepsy are perceived, accepted and valued in society; and promote
9 research for a cure." *See www.epilepsyfoundation.org.*

10 10. Many members of Plaintiff Epilepsy Foundation use Diastat in cases of
11 seizures. Members of Plaintiff Epilepsy Foundation have been denied participation
12 in Tutor Time programs due to Tutor Time's policy against the administration of
13 Diastat.

14 11. Because Plaintiff Epilepsy Foundation provides support for inclusion and
15 against discrimination against persons who have Epilepsy, combating Tutor Time's
16 discriminatory policy against the administration of Diastat is germane to Plaintiff
17 Epilepsy Foundation's purpose.

18 12. Because the Complaint seeks to enjoin Tutor Time from enforcing its
19 discriminatory policy now and in the future, individual members of Plaintiff
20 Epilepsy Foundation's organization are not necessary in this case.

21 13. Defendant Tutor Time Learning Centers, LLC, is a Michigan corporation
22 located at 21333 Haggerty Road Suite 300 Novi, MI 48275.

23 14. Defendant GFGTT Holdings, Inc., is a California corporation with
24 principal offices in California.

25 15. Defendants, own[ed], operate[d], and/or lease[d] the Tutor Time Child
26 Care/Learning Center at issue located at 6020 Hamner Ave., Mira Loma, CA 91752
27 (Tutor Time Center). Tutor Time Center is a place of public accommodation, and
28 business establishment as defined by the applicable statutes and regulations. *See* 28

1 C.F.R. § 36.104; Cal. Civil Code § 51(b); Cal. Civil Code §§ 54, 54.1(a).

2 16. Upon information and belief, in October 2005, GFGTT Holdings, Inc.,
3 was the franchisee owner of the Tutor Time Center and Tutor Time Learning
4 Centers, LLC was the franchisor or had substantial control of the franchising entity.
5 Upon information and belief GFGTT Holdings, Inc. subsequently sold the Tutor
6 Time Center to Tutor Time Learning Centers, LLC., which assumed the rights and
7 liabilities of the Tutor Time Center

8 17. Plaintiffs are informed and believe, and thereon allege, that Defendants
9 and each of them herein were, at all times relevant to the action, the owner, operator,
10 franchisor, franchisee, lessee, general partner, limited partner, agent, employee,
11 representing partner, or joint venturer of the remaining Defendants and were acting
12 within the course and scope of that relationship. Plaintiffs are further informed and
13 believe, and thereon allege, that each of the Defendants herein gave consent to,
14 ratified, and/or authorized the acts alleged herein in each of the remaining
15 Defendants and their employees are vicariously liable for the same.

16 **FACTS**

17 18. Plaintiff Rager is an eight-year old boy with epilepsy, mild cerebral palsy,
18 and mental retardation.

19 19. Plaintiff Rager's epilepsy causes him to have recurrent unprovoked
20 seizures.

21 20. At all relevant times, Plaintiff Rager's doctor has prescribed that Plaintiff
22 Rager be administered Diastat Acudial, a rectally administered gel, after he has a
23 seizure lasting five minutes or longer.

24 21. Diastat, the standard out-of-hospital medication for treatment of
25 prolonged seizures, is designed for administration by lay caregivers and to prevent
26 longer or repetitive seizures that can lead to brain damage or even death.

27 22. On or about October 10, 2005, Plaintiff Rager's mother, Denise Rager,
28 went to the Tutor Time Center to inquire whether Defendants' employees or agents

1 could pick up Plaintiff Rager after school to care for him and provide full day care
2 during school holidays and mid-term breaks.

3 23. Defendants' employee(s) or agent(s) initially informed Ms. Rager that
4 they did not foresee a problem with accommodating Plaintiff Rager by
5 administering Diastat in the event that he had a seizure lasting five minutes or
6 longer.

7 24. In October 2005, Ms. Rager submitted Defendant's enrollment forms on
8 which she had provided further detail about Plaintiff's disability or medical
9 condition, the need for Plaintiff Rager to be accommodated by Defendants'
10 employees or agents through the administration of Diastat if Plaintiff had a seizure
11 lasting five minutes, and the procedure by which Diastat should be administered.

12 25. In October 2005, Plaintiff Rager attended the Tutor Time Center for
13 approximately four hours with the understanding that Plaintiff's father Eric Rager
14 could arrive at the Tutor Time Center in less than five minutes if Plaintiff had a
15 seizure. Defendant's employees or agents at the Tutor Time Center stated that they
16 could not administer Diastat until Plaintiff Rager's parents had filled out a form
17 signed by Plaintiff Rager's doctor, which Plaintiff's parents planned to return in the
18 coming weeks.

19 26. In October 2005, Defendants' employees or agents informed Denise and
20 Eric Rager that they could not accommodate Plaintiff Rager by administering
21 Diastat in case he had a seizure lasting five minutes because it would violate their
22 policy against administering medications that they deemed invasive.

23 27. Plaintiff Rager was very upset that he could not attend the Tutor Time
24 Center because he was looking forward to doing so.

25 28. Plaintiff Rager's parent attempted unsuccessfully to obtain alternative day
26 care following Tutor Time's discriminatory removal of the child from its program.

27 29. Plaintiff Rager still wishes to attend the Tutor Time Center or another
28 Tutor Time Child Care/Learning Center owned or operated by Defendants in the

1 future.

2 30. As a result of Defendants' discriminatory practices, Plaintiff Rager was
3 denied equal services or privileges of the Tutor Time Center and a reasonable
4 accommodation as required by law, which caused Plaintiff Rager damages and
5 irreparable injury.

6 31. Plaintiff Epilepsy Foundation has supported members, including Plaintiff
7 Rager, in counteracting the discrimination that he and other children experienced as
8 a result of Tutor Time's policies and practices. As a result, the Epilepsy Foundation
9 dedicated time and staff power into assisting its members in dealing with this matter.
10 This is time that Plaintiff Epilepsy Foundation could not spend pursuing advocacy
11 on behalf of other members, or advancing its mission to control or develop a cure
12 for Epilepsy.

13 32. Plaintiff Epilepsy Foundation has assisted children, including Plaintiff
14 Rager, who have been prevented from attending Tutor Time programs due to Tutor
15 Time's discriminatory policy against the administration of Diastat.

16 33. Defendants perceived Plaintiff Rager and other children to have a
17 disability and medical condition as defined by the ADA, UCRA, and Cal. Civil
18 Code §54.1.

19 34. Plaintiff Rager and other children sought the assistance of Plaintiff
20 Epilepsy Foundation due to Defendants' actions.

21 35. The injuries suffered by Plaintiff Rager and other members of the
22 Epilepsy Foundation due to Tutor Time's discriminatory policy are germane to
23 Plaintiff Epilepsy Foundation's mission to prevent discrimination against persons
24 who have Epilepsy.

25 **STATEMENT OF CLAIMS**

26 **Count I: Americans with Disabilities Act**

27 36. Plaintiffs reallege and incorporate by reference paragraphs 1-33.

28 37. Under Title III of the ADA, "[n]o individual shall be discriminated

1 against on the basis of disability in the full and equal enjoyment of the goods,
2 services, facilities, privileges, advantages, or accommodations of any place of public
3 accommodation by any person who owns, leases (or leases to), or operates a place of
4 public accommodation.” 42 U.S.C. § 12182(a).

5 38. Discrimination under Title III of the ADA includes “the imposition or
6 application of eligibility criteria that screen out or tend to screen out an individual
7 with a disability or any class of individuals with disabilities from fully and equally
8 enjoying any goods, services, facilities, privileges, advantages, or accommodations,
9 unless such criteria can be shown to be necessary for the provision of the goods,
10 services, facilities, privileges, advantages, or accommodations being offered.” 42
11 U.S.C. § 12182(b)(2)(A)(i).

12 39. Discrimination under Title III of the ADA also includes “a failure to
13 make reasonable modifications in policies, practices, or procedures, when such
14 modifications are necessary to afford such goods, services, facilities, privileges,
15 advantages, or accommodations to individuals with disabilities, unless the entity can
16 demonstrate that making such modifications would fundamentally alter the nature of
17 such goods, services, facilities, privileges, advantages, or accommodations.” 42
18 U.S.C. § 12182(b)(2)(A)(ii).

19 40. Discrimination under Title III of the ADA also includes excluding or
20 otherwise denying “equal goods, services, facilities, privileges, advantages,
21 accommodations, or other opportunities to an individual or entity because of the
22 known disability of an individual with whom the individual or entity is known to
23 have a relationship or association.” 42 U.S.C. § 12182(b)(1)(E).

24 41. Defendants have discriminated against Plaintiffs in violation of Title III
25 of the ADA by denying them full and equal enjoyment of the goods, services,
26 facilities, privileges, advantages, or accommodations of the Tutor Time Center
27 based on Plaintiffs’ disability.

28 42. Defendants have discriminated against Plaintiffs in violation of Title III

1 of the ADA by imposing or applying eligibility criteria that screen out or tend to
2 screen out people with disabilities.

3 43. Defendants have discriminated against Plaintiffs in violation of Title III
4 of the ADA by failing to make reasonable modifications of their policies, practices,
5 and procedures that are necessary to afford Plaintiffs, based on disability, the goods,
6 services, facilities, privileges, advantages, or accommodations of the Tutor Time
7 Center.

8 44. Defendant committed the unlawful practices complained of above with
9 malice or with reckless indifference to Plaintiffs' federally protected rights.

10 45. As a result of Defendant's discriminatory actions, Plaintiffs' civil rights
11 have been violated.

12 **Count II: Unruh Civil Rights Act**

13 46. Plaintiffs reallege and incorporate by reference paragraphs 1-43.

14 47. Under UCRA, all persons in California "are free and equal, and no matter
15 what their . . . disability [or] . . . medical condition . . . are entitled to the full and
16 equal accommodations, advantages, facilities, privileges, or services in all business
17 establishments of every kind whatsoever." Cal. Civil Code § 51(b).

18 48. UCRA prohibits business establishments from discriminating against
19 people based on their disabilities. Cal. Civil Code § 51.5(a).

20 49. A violation of the ADA constitutes a violation of Cal. Civil Code § 51.
21 Cal. Civil Code § 51(f).

22 50. Defendants discriminated against Plaintiffs based on their disability or
23 medical condition, causing them harm.

24 51. Defendants' discrimination against Plaintiffs was intentional.
25 Defendant committed the unlawful practices complained of above with malice or
26 with reckless indifference to Plaintiffs' protected rights.

27 **Count III: Cal. Civil Code § 54 et seq.**

28 52. Plaintiffs reallege and incorporate by reference paragraphs 1-49.


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(d) costs and reasonable attorneys fees.

Dated: January 18, 2008. Respectfully submitted,

PROTECTION & ADVOCACY, INC

Andrew Mudryk
Lauren Giardina
Kimberley Baker

By: 
LAUREN GIARDINA
Attorneys for Plaintiffs

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PROOF OF SERVICE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Number: EDCV 07-00189-SGL-OP

I am employed in the County of San Diego, California. I am over the age of eighteen years and not a party to the within action. My business address is: 1111 Sixth Ave., Ste. 200; San Diego, CA 92101.

On January 18, 2008, I served the foregoing document(s) entitled as:

1. Proposed Third Amended Complaint

on the parties in this action as follows:

Melissa O'Mansky, Esq.
Lewis Brisbois Bisgaard & Smith
221 N Figueroa St Ste 1200
Los Angeles, CA 90012-2646
(213) 580-3098
Fax No.: (213) 250-7900
E-mail: Omansky@lbbslaw.com

METHOD OF SERVICE

(BY MAIL) I deposited such envelope(s) in the mail at Los Angeles, California. The envelope(s) was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same date in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on January 18, 2008, at San Diego, California.


Katherine Philbin